No. 266.

Brief of Collins for P. E.

Filed Oct. 13, 1897.

Supreme Court of the United States

OCTOBER TERM, 1896.

[redacted]

RICHARD S. WILLIAMS,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief on Behalf of Plaintiff in Error.

GEORGE D. COLLINS,
Counsel for Plaintiff in Error.

Jos. Winterburn Co., Printers, S. F.

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1896.

No. 661.

RICHARD S. WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief on Behalf of the Plaintiff in Error.

STATEMENT.

Indictment for alleged extortion of one hundred dollars under "color of office." The plaintiff in error was prosecuted, convicted and sentenced pursuant to the provisions of Section 3169 of the Revised Statutes, taken in connection with Section 23 of the Act of February 8th, 1875, entitled "An Act to Amend Existing Customs and Internal Revenue Laws, and for other purposes." (Suppl. Rev. Stat., p. 61). It is charged in the indictment that at the time of the alleged extortion plaintiff in error was "an officer of the Department of Treasury of the said "United States, duly appointed and acting under the "authority of the laws of the said United States, and "being then and there a person designated as Chinese "Inspector at said port of San Francisco, and by virtue

" of his said office being then and there authorized, di-
" rected and required to aid and assist the Collector of
" Customs of said port in the enforcement and carrying
" out of the various laws and regulations of the said
" United States relating to the coming of Chinese persons
" and persons of Chinese descent from foreign ports to the
" United States at said port of San Francisco." It is further charged that under color of said office the money was extorted from one Wong Sam as a condition for landing Wong Lin Choy. There are two counts in the indictment; a motion in arrest of judgment on the second count was sustained. On the first count, the lower court held that plaintiff in error was a *custom's inspector*, and that the authority for his appointment is to be found in section 2606 of the Revised Statutes; on that indefensible theory the court reached the rather extraordinary conclusion that the plaintiff in error is accused and convicted of violating section 3169 of the Revised Statutes, and accordingly sentenced him to imprisonment in the penitentiary at San Quentin for the period of three years and to pay a fine of $5,000.00, with further imprisonment until the fine be paid. There are two Indictments of two counts each, and for distinct and independent offenses; the court ordered the Indictments consolidated and a conviction resulted on both. The judgment was on motion of plaintiff in error, arrested on the second counts of *each* Indictment.

The errors relied upon for reversal of the judgment, arise upon the judgment roll and a Bill of Exceptions. The questions presented relate to the sufficiency of the Indictment, the nature and character of the offense charged, error in consolidating the Indictments, errors in ruling admissible certain testimony and in overruling objections thereto, error in overruling an objection to certain improper statements made by the Special Attorney for the Government, and tending to prejudice the jury against the defendant, insufficiency of the evidence to sustain the verdict and judgment, errors in giving certain instructions to the jury, and error in sentencing the defendant to the penitentiary.

ERRORS ASSIGNED.

The following constitute the errors relied upon in support of the prayer for a reversal of the judgment, viz.:

I.

The Indictment is not sustained by Section 3169 of the Revised Statutes; nor does Section 23 of the Act of February 8th, 1875, apply to the case. The court erred in overruling the demurrer.

II.

The court erred in ordering the consolidation of the Indictments.

III.

The court erred in overruling the objection to and in admitting in evidence, the affidavit of defendant made by him in the case of *Isabella M. Williams* vs. *Richard S. Williams*, pending in the Superior Court in and for the City and County of San Francisco, State of California, and filed therein June 1st, 1896. The affidavit is as follows:

"STATE OF CALIFORNIA, } ss.
" *City and County of San Francisco,* }

" Richard S. Williams, being first duly sworn, deposes " and says:

" I have read the affidavit of plaintiff in reply on her " motion for alimony, etc., and in reply thereto I desire " to say it is untrue that prior to the time I entered the em- " ployment of the United States Government I was with- " out means and had had no money for quite a time before, " or that I had to borrow money to pay my living expenses. " On the contrary, when I entered the employment of the " United States Government, on or about the 28th day of " September, 1893, I was worth more money then than I " am at the present time, being worth about $5,000.00, " and since then having inherited some property: that the " $3,000.00 referred to in said affidavit was not acquired " by me during the time I was in the employment of the " United States Government, as set forth in said affidavit " but is a portion of the $5,000.00 heretofore referred to

" The statement in said affidavit that I have in my " possession or had in my possession, in addition to the " said sum of $3,000.00 aforesaid, the sum of $5,000.00 " instead of $4,000.00 is false and untrue; that to my " knowledge the plaintiff was not in the habit of carrying " said sum of $5,000.00 in the bosom of her dress. (On " the contrary, there was on deposit in the Hibernia Sav- " ings and Loan Society in her name, belonging to me, the " sum of about $4,000.00, which was a part of the $5,000.00 " possessed by me at the time I entered the employment " of the United States Government. The $3,000.00 in " bank referred to is a portion of said sum so deposited in " the name of plaintiff in the Hibernia Savings and Loan " Society.)

" In answer to the statement contained on page 2 of " said affidavit, to the effect that plaintiff paid for the " piano therein referred to and the bill therefor was made " out in her name, I simply desire to annex the bill for " said piano to this affidavit, showing the bill to be made " out in the name of R. S. Williams.

" The property at Nos. 420 and 422 Scott street, men- " tioned on page 2 of said affidavit, was acquired by my " stepfather, Henry Monsferran, now deceased. He was " a foreigner, unaccustomed to speaking the English " language, and the details of the purchase were made by " me, but the money that paid for said property was sole- " ly and exclusively the money of the said Henry Mons- " ferran. The deed to the property was taken in his " name.

" It is untrue that at the time plaintiff left our residence " on the 29th day of April, 1896, she left said sum of " $5,000.00 in greenbacks. On the contrary, as above " stated, there was no such sum, and the money referred " to by her as having been drawn from the Hibernia " Savings and Loan Society is $3,000.00, so deposited in " the savings bank.

" It is untrue, as stated in said affidavit, that I avoid- " ed the service of the summons and complaint in this

" action, or that by reason thereof plaintiff incurred an " expenditure of $11.25.

" RICHARD S. WILLIAMS.

" Subscribed and sworn to before me this 1st day of " June, A. D. 1896.

" [NOTARIAL SEAL.] LEE D. CRAIG,

" *Notary Public in and for the City and County*

" *of San Francisco, State of California.*

" Said affidavit is endorsed: Filed June 1st, 1896. C. " F. Curry, clerk, by Geo. W. Lee, deputy clerk."

IV.

The court erred in overruling the objection to and in admitting in evidence the book of deposit of moneys in the San Francisco Savings Union, a banking corporation of the State of California, which book and deposits are in the name of Richard S. Williams, the defendant, said book showing entries of the following sums deposited on the following dates, viz.: October 29th, 1893, $350; November 18th, 1895, $400; December 17th, 1895, $550, making a total of $1,300.

V.

The court erred in overruling the objection to and in admitting in evidence the book of deposit of moneys in the Hibernia Savings and Loan Society, a banking corporation of the State of California, which book and deposits are in the name of Isabella M. Williams, said book showing entries of the following sums deposited on the following dates, viz.: September 10th, 1895, $300; September 24th, 1895, $150; October 8th, 1895, $800; October 23rd, 1895, $500; November 12th, 1895, $700; December 2nd, 1895, $1,000, making a total of $3,450.

VI.

The court erred in overruling the objection to and in admitting in evidence the testimony of J. J. Tobin relative to the "general reputation" of defendant in the custom house.

VII.

The Court erred in overruling the objection to, and in admitting in evidence, the testimony of Ling Yow, relative to whether he was convicted of perjury, and whether the verdict of the jury was guilty or not guilty, and as to what crime he was charged with in the Indictment, at the time he was tried.

VIII.

The Court erred in overruling the objection to the statement of the Special Attorney for the Government, that "no doubt every Chinese woman who did not pay "Williams was sent back." Said statement was made during the trial, and while the witness John H. Wise was giving his testimony, and tended to prejudice the jury against the defendant.

IX.

The Court erred in giving the following instruction to the jury, viz:

"There has been some testimony in support of the alle-
"gations of these indictments respecting the pecuniary
"condition of the defendant, and also testimony as to the
"extent of his compensation by the Government for ser-
"vices. This evidence was admitted in compliance with
"a well-known rule which establishes the relevance of
"evidence of this character where the charge is such as
"that alleged in these indictments.

"If the salary of the defendant, during the time alleged
"in the indictments and before then, was four or five
"dollars per day, and if the testimony shows to your
"satisfaction that he has deposited in bank or there was
"deposited to his credit in bank in the neighborhood of
"$4,750.00 from September 10th to December 17th, 1895,
"alleged in the indictments, then such testimony may be
"considered by you with a view of ascertaining how or by
"what means the defendant obtained that amount of
"money at a time when his compensation by the Govern-
"ment, as is claimed by the prosecution, was not to exceed
"about $150.00 per month.

" Where did he get such large sums of money ? From " what source other than the source named in the indict- " ments did he acquire this money ? Has he furnished " evidence explaining to your satisfaction the possession " of these sums of money ?

" These are all questions which you will consider, and " if any explanation made by the defendant as to how he " came by this money seems incredible, irrational, and " unsatisfactory you are at liberty to reject it and to act " upon the other testimony in the case. If, after doing " all this, you feel to a moral certainty and beyond a " reasonable doubt that he took the money as alleged in " the indictments, then your verdict should be guilty.

" In reference to the testimony which has been intro- " duced in the case showing the pecuniary condition of " the defendant, that if testimony explaining how, when, " and by what means the defendant acquired possession of " the sums of money shown to have been deposited in the " San Francisco Savings Union and Hibernia Bank could " have been offered by defendant, and he failed to produce " such testimony, then such failure may very properly be " taken into consideration by the jury in determining the " defendant's guilt or innocence.

" Where probable proof is brought of a state of facts " tending to criminate the accused, the absence of evidence " tending to contrary conclusion may be considered, al- " though this attitude of the case alone would not be en- " titled to much weight, because the burden of proof lies on " the prosecution to make out the whole case by sufficient " evidence; but when proof of inculpating circumstances " has been produced tending to support the charge, " and it is apparent that the accused is so situated that " he could offer evidence of all the facts and circumstances " as they existed, and to show, if such was the truth, that " the suspicious circumstances can be accounted for con- " sistently with his innocence, and he fails to offer such " proof, the natural conclusion is that the proof, if pro- " duced, instead of rebutting, would tend to sustain the " charges.

" Therefore, if in this case the defendant could have " produced testimony explaining his several deposits in " the San Francisco Savings Union and the Hibernia Bank " during the months of September, October, November, " and December, 1895, and has failed to produce such " testimony, then you are at liberty to infer that any ex- " planation in his power to make would have been, if " made, adverse and prejudicial to the defense.

" The law has been stated by the circuit court of ap- " peals for the eighth circuit very recently in the case of " Gulf, C. & S. *Co.* Railway *vs.* Ellis, in the 4th United " States circuit court of appeals. Judge Caldwell, speak- " ing for the circuit court of appeals, said:

" 'Now, it is a well-settled rule of evidence that when " the circumstances of proof tend to fix a liability on a " party who has it in his power to offer evidence of all the " facts as they existed and rebut the inferences which the " circumstances in proof tend to establish, and he fails to " offer such proof, the natural conclusion is that the proof, " if produced, instead of rebutting, would support the in- " ference against him, and the jury is justified in acting " upon that conclusion. " It is certainly a maxim," said " Lord Mansfield, " that all evidence is to be weighed " according to the proof which it was in the power of one " side to have produced and in the power of the other side " to have contradicted."

" Blach *vs.* Archer, Cowp., 63, 65.

" 'It is said by Mr. Starkie in his work on Evidence, " vol. 1, p. 54:

" 'The conduct of the party in omitting to produce that " evidence in elucidation of the subject matter in dispute " which is within his power and which rests peculiarly " within his own knowledge frequently affords occasion for " presumption against him, since it raises strong suspicion " that such evidence, if adduced, would operate to his " prejudice.'

" 'The same rule is applicable even in criminal cases. " Com. *vs.* Webster, 5 Cush., 295, 316; People *vs.* Mc " Whorter, 4 Barb., 438.' Respecting the contents of the

" affidavit made by the defendant and sworn to before " Lee D. Craig, a notary public in this city and county, " which has been read in evidence, I instruct you that the " prosecution is not bound by all the statements in said " affidavit. It is the duty of the jury to ascertain from " said affidavit and from the other testimony in the case " what portions of the same are true. The jury is then at " liberty to believe one part of it and to disbelieve the " other part.

" Such affidavit was introduced upon the theory that it " constituted an admission on the part of the defendant " as to his ownership of certain funds referred to therein. " The defense then insisted, as they had a right to, that " the entire affidavit should be read. The whole of it is " now before you, and it is for you to determine, from all of " the circumstances of this case, the situation of the de- " fendant, and all of the evidence that has been introduced, " as to what portion of said affidavit, if any, is true. You " are at liberty to believe or reject such portions of it as " you think may be worthy of belief or disbelief.

" In this respect I call your attention to the deposits " as they were made. The first deposit in the San Fran- " cisco Savings Union was made on October 29, 1895, " amounting to $350. On November 18, 1895, there was " a deposit of $400, and on December 17, 1895, there was " a deposit of $550, making a total of $1,3000.

" Then there was a deposit made with Hibernia Savings " and Loan Society on September 10, 1895, $300; on " September 24th, $150; October 8th, $800; October 23d, " $500: November 12th, $700: December 2d, $1,000, mak- " ing a total of $3,450, and adding the amount deposited " in the San Francisco Savings Union of $1,300, it makes " a total in three months and seventeen days of $4,750.

" These deposits were made, as you will observe, at " different times. In September he appears to have de- " posited the sum of $450; in October he deposited $1,650; " in November he deposited $1,100, and in December, up " to the 17th, he deposited $1,550, making a total, as I " said, of $4,750; nine deposits in three months and seven-

" teen days. Does the defendant's affidavit satisfactorily " explain or account for the receipt of these sums of " money ? "

X.

The Court erred in its judgment sentencing defendant to imprisonment in the California State Prison at San Quentin, for three years, and to pay a fine of $5,000.

ARGUMENT.

1. In the Court below, this case was tried and the defendant convicted and sentenced upon the theory that the Indictment charged him with the offense prescribed by sub-division one of Section 3169 of the Revised Statutes, taken in connection with Section 23 of the Revenue Act of February 8, 1875, Supplement Revised Statutes, page 61; the Court holding defendant to be a customs revenue officer and ascribing the authority for his appointment to a revenue law, to wit: Section 2606 of the Revised Statutes. (Transcript, p. 18 *et seq.*) In this, undoubtedly, the Court below committed a most palpable error. The defendant is not charged in the Indictment with being a revenue or customs revenue officer; on the contrary it is explicitly averred that he is an officer of the Department of Treasury designated "Chinese Inspector at the port of San Francisco," and that the duties of his office and his official functions are to "aid and assist the Col- " lector of Customs of said port in the enforcement and " carrying out of the various laws and regulations of the " said United States relating to the coming of Chinese " persons and persons of Chinese descent from foreign " ports to the United States at said port of San Fran- " cisco."

It is manifest then, that assuming for the purpose of this point, that the averment of official character is sufficient, defendant's official position appertains exclusively to the Chinese Exclusion Law. That law is not a revenue measure; nor is it made such by reason of the fact that its enforcement is committed to the Treasury Department; nor by reason of the fact that in some cases the Collector of Internal Revenue is required to enforce certain of its

provisions, while in other cases, the Collector of Customs is charged with the enforcement of other provisions. It is quite common for Congress to impose such duties on the Department of Treasury and the subordinate officers of that Department (*Nishimura Ekiu* vs. *United States, 142 U. S., 659);* but it by no means follows that such laws are revenue measures, and the officers revenue officers. Section 3169 of the Revised Statutes applies only to revenue officers, even under the provisions of Section 23 of the Act of February 8th, 1875. That Act is a *revenue* law and the very language of Section 23 confines its operation to persons "acting under the authority of "any internal revenue or customs law or any revenue "provision of any law of the United States, when such "persons are designated or acting as officers or deputies, "or persons having the custody or disposition of any "public money." The Chinese Exclusion Act is in no sense a customs law, and we must confess our complete inability to discover a semblance of reasoning in the mental process, by means of which the lower court held the defendant to be within the provisions of subdivision one of Section 3169 of the Revised Statutes, and punished him accordingly. The court's conclusion is the more indefensible, in view of the fact that in its opinion on the motion in arrest of judgment (Trans. p. 20) reference is made to the very law under which defendant must have been appointed, if at all. That law is to be found in all the Appropriation Acts, from 1890 to the present, and in the following words, under the title of "Miscellaneous objects under the Treasury Department," viz.: "Enforcement of "Chinese Exclusion Act: To prevent unlawful entry of "Chinese into the United States, by the appointment of "suitable officers to enforce the laws in relation thereto "and for expenses of returning to China all Chinese per- "sons found to be unlawfully in the United States."

26 Statutes at Large, 387, 968.
27 Statutes at Large, 589.
28 Statutes at Large, 41, 390, 637, 846, 932.
29 Statutes at Large, 431.

And yet, notwithstanding the averments of the Indictment, the lower court asserts that defendant's appointment was made under the provisions of Section 2606 of the Revised Statutes, which section is one of a series of sections of the *revenue* law of July 14, 1870, relative to "internal taxes," and in its original and unabridged form provides for the appointment at certain ports of the United States of "such number of weighers, gaugers, " measurers and inspectors as may be necessary to exe- " cute the provisions of this Act." The defendant was not appointed under that law, and if he was, his position and duties as Chinese Inspector for the port of San Francisco, and his alleged extortion of money under color of *that* office, would be entirely and absolutely independent of and foreign to his position of inspector under Section 2606 of the Revised Statutes. It is an entirely different office. He is not charged with extortion under color of his office of revenue inspector—the office provided for in Section 2606.

It follows that the Indictment is fatally defective in being framed upon Section 3169, and that the judgment is for the same reason, not merely voidable, but absolutely void.

The law governing the offense of extortion "under color of office" is *Section 5481 of the Revised Statutes*, and the extreme penalty there prescribed is a fine of not more than $500, *or* imprisonment not more than one year; whereas, under Section 3169, the law by virtue of which defendant was sentenced and received the extreme penalty, the punishment is a fine of not less than $1000 nor more than $5000 *and* imprisonment for not less than six months nor more than three years.

2. Even if the Indictment in a case like this could be framed under subdivision one of Section 3169, it would not be valid unless it clearly and unmistakably brought the case within the language of that law.

United States vs. Brewer, 139 U. S., 288.
Hess vs. United States, 124 U. S., 486.
Bishop on Statutory Crimes, Sec. 380.

The Indictment in this case does not do so. It charges extortion " under color of office "; whereas, the extortion provided for in Subdivision one of Section 3169, must be " under color of law."

3. The Indictment is also fatally defective in this: It avers that the money was extorted under color of office, and then states in detail how it was obtained, and that specific statement of the facts shows that the money was not obtained under color of office, but was obtained by false representations ; such being the case it is not extortion.

Collier vs. State, 55 Ala., 125.

4. The Indictment is also fatally defective in this: It does not sufficiently show that defendant was at the time of the alleged extortion an officer of the United States, either *de facto* or *de jure*. The allegation that he was an officer of the Department of Treasury of the United States does not necessarily indicate that he is an officer of the United States ; nor is such an averment sufficiently specific. The allegation that he was " designated as Chinese inspector at the port of San Francisco " does not supply the defect. There is no such officer known to the law as that of Chinese inspector, and even if there was, to allege as does this Indictment that the defendant was a person *designated as Chinese inspector* at said port of San Francisco, is clearly not the equivalent of an allegation that he was Chinese inspector.

II.

The lower court erred in consolidating the Indictments against the defendant's exception. (Trans. 43.) The Indictments state " substantive offences, separate and dis- " tinct, complete in themselves and independent of each " other, committed at different times and not provable by " the same evidence."

McElroy vs. United States, 164 U. S., 76.

The offences could not have been joined in one Indictment, and therefore the Indictments were erroneously consolidated.

Sec. 1024 Revised Statutes.

III.

The court below fell into flagrant error in admitting in evidence against defendant's objection, his affidavit filed in the Superior Court in and for the City and County of San Francisco, in the case of *Williams* vs. *Williams*. (Trans. p. 32.) The purpose for which the court admitted the testimony is stated in the instruction to the jury (Trans. p. 42) to be that it constituted "an admission on "the part of defendant as to his ownership of certain "funds referred to therein." On that basis the court went on and instructed the jury that the *onus* was on the defendant to show that he acquired those funds innocently. That instruction we will attack presently; but even assuming what is not the fact, that the affidavit had such tendency as the court held it to possess, and that it furnished evidence incriminating in character, its admission was in that case in plain violation of Section 860 of the Revised Statutes. It constituted evidence obtained from a party by means of a judicial proceeding and for that reason was not admissible.

IV.

There is likewise manifest error in admitting the bank books in evidence (Trans. p. 34); especially the bank book of Isabella M. Williams,—a person not shown to be in privity with defendant. These bank books, together with the affidavit, constitute the evidence on which the lower court gave to the jury a certain exceedingly erroneous instruction; in the discussion of that error we can better demonstrate the injury we sustained by the admission in evidence of the affidavit and bank books, and therefore refer to what is hereinafter said upon the subject.

V.

The testimony of J. J. Tobin (Trans. p. 35 *et seq*), introduced and by the court admitted to impeach the credibility of defendant, is another instance of flagrant error. A witness cannot be impeached by evidence of his reputation for truth, honesty and integrity, *in the custom house*, and the defendant's objection should have been sustained.

VI.

Ling Yow was one of the witnesses for the defendant, and after giving material testimony in support of defendant's case (Trans. p. 36), he was asked as to whether he was ever convicted of perjury, what offense he was charged with in the Indictment, and whether the verdict was guilty or not guilty. Objection was made to each of those questions as being irrelevant, incompetent, and that the proper foundation had not been laid and that the record was the best evidence. The objections were overruled and exceptions reserved. The rulings were clearly erroneous.

People vs. Reinhart, 39 Cal., 449.
1 Greenleaf on Evidence, Sec. 457.
People vs. Hamblin, 68 Cal., 103.
People vs. Crapo, 76 N. Y., 293.

VII.

The action of the lower court in overruling the objection made to the statement of Mr. Henley, special counsel for the prosecution, (Trans. p. 35) is gross error. When he stated in the hearing of the jury that "no doubt every "Chinese woman who did not pay Williams was sent "back" to China, it was the duty of the court to rebuke counsel for making such an improper remark; but instead of a rebuke, the court gave emphasis to and corroborative of the statement by overruling defendant's objection to it. Such action on the part of the court constitutes reversible error.

Graves vs. United States, 150 U. S., 120.

VIII.

The court in instructing the jury (Trans. p. 41), adverted to the affidavit of defendant in the case of *Williams* vs. *Williams*, and to the various deposits shown by the bank books and aggregating $4,750, and told the jury that they might consider those deposits in connection with the other fact that the defendant received from the Government a salary not to exceed about $150 per month, and that they were to ascertain how or by what means the defendant obtained the $4,750. "Where did he get such large sums of money? "from what source other than the source named in the

" Indictments did he acquire this money ? Has he fur-
" nished evidence explaining to your satisfaction the
" possession of these sums of money ?" * * * *
" Therefore if in this case the defendant could have pro-
" duced testimony explaining his several deposits in the
" San Francisco Savings Union and the Hibernia Bank
" during the months of September, October, November,
" and December, 1895, and has failed to produce such
" testimony, then you are at liberty to infer that any ex-
" planation in his power to make would have been if
" made, adverse and prejudicial to the defense." These are portions of the instructions given; there is more of a like character. That the District Judge did not understand the law, is apparent. In the first place he was wrong in referring to the deposit in the Hibernia Bank as the *defendant's* deposit; there is no evidence to that effect in the case, and the transcript of the record at page 35, virtually so declares. In the next place the combined Indictments charged an extortion of but $185, and yet the instruction called upon the defendant to explain deposits made before and after the alleged commission of the offenses, and aggregating $4,750. In the next place, as the transcript affirmatively shows at page 43, there was no evidence that any part of said sum of $4,750 constituted the "fruit of crime" (*3 Greenleaf on Evidence, Sec. 31*), nor that any portion of that sum embraced the $185, "the money " charged in the Indictments herein to have been unlaw-
" fully taken by defendant." In short, there was nothing *suspicious* in character in the fact that the deposits had been made; and it is only where there exists suspicious and inculpatory circumstances relative to the acquisition of the money that the rule referred to by the lower court has any application. The presumption of innocence protected the defendant from every adverse inference that the lower court told the jury they could draw from the unexplained possession by defendant of the money on deposit in his name. It was not shown to be the fruit of crime; it was not shown to be suspicious or inculpatory, and therefore no explanation from defendant was neces-

sary. It is to be noted that the record affirmatively shows that the bank books and the affidavit are the only evidence before the court relative to said deposits. (Trans. p. 35.) The true rule is stated in *Graves* vs. *United States, 150 U. S., 120*, and it is quite clear that the District Judge did not correctly understand the rule nor the authorities he cited. His instruction violates the law as declared in

Chaffee vs. United States, 18 Wall., 516, 545.
Doty vs. State, 7 Blackf., 427.

IX.

The evidence is manifestly insufficient to sustain the verdict and judgment. The Indictment charges the defendant with extorting one hundred dollars from *Wong Sam*. The evidence is that the extortion, if any, was from *Chin Deock* and not Wong Sam. See Transcript, page 37, *et seq*. The point is not merely one of variance; it presents a case where there is a complete failure of proof.

Commonwealth vs. Bagley, 7 Pick., 279.

X.

The judgment is undoubtedly void. It is based upon Section 3,169 of the Revised Statutes, and we have pointed out that the case is not within the provisions of that section. The penalty for extortion under "color of office" is prescribed by Section 5,481, and is limited to one year or a fine of $500. The judgment is also void because by its terms the defendant is sentenced for extorting $85 "under color of his office as Chinese inspector of the Department of Treasury at the port of San Francisco." (Trans. 17). There is no such office known to the law. The judgment is likewise void for the reason that the Indictment is insufficient to sustain it—a point hereinbefore fully discussed.

We respectfully submit that the judgment ought to be *reversed*.

GEORGE D. COLLINS,
Counsel for Plaintiff in Error.

No. 264.

Brief of Collins for P. E.

Filed Oct. 13, 1897.

Supreme Court of the United States

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Brief on Behalf of the Plaintiff in Error.

STATEMENT.

Indictment for alleged extortion of eighty-five dollars under "color of office." The plaintiff in error was prosecuted, convicted and sentenced pursuant to the provisions of Section 3169 of the Revised Statutes, taken in connection with Section 23 of the Act of February 8th, 1875, entitled "An Act to Amend Existing Customs and Internal Revenue Laws, and for other purposes." (Suppl. Rev. Stat., p. 61). It is charged in the indictment that at the time of the alleged extortion plaintiff in error was "an officer of the Department of Treasury of the said "United States, duly appointed and acting under the "authority of the laws of the said United States, and "being then and there a person designated as Chinese "Inspector at said port of San Francisco, and by virtue

" of his said office being then and there authorized, di-
" rected and required to aid and assist the Collector of
" Customs of said port in the enforcement and carrying
" out of the various laws and regulations of the said
" United States relating to the coming of Chinese persons
" and persons of Chinese descent from foreign ports to the
" United States at said port of San Francisco." It is further charged that under color of said office the money was extorted from one Chan Ying as a condition for landing Chin Shee Hung. There are two counts in the indictment; a motion in arrest of judgment on the second count was sustained. On the first count, the lower court held that plaintiff in error was a *custom's inspector*, and that the authority for his appointment is to be found in section 2606 of the Revised Statutes; on that indefensible theory the court reached the rather extraordinary conclusion that the plaintiff in error is accused and convicted of violating section 3169 of the Revised Statutes, and accordingly sentenced him to imprisonment in the penitentiary at San Quentin for the period of three years and to pay a fine of $5,000.00, with further imprisonment until the fine be paid. There are two Indictments of two counts each, and for distinct and independent offenses; the court ordered the Indictments consolidated and a conviction resulted on both. The judgment was on motion of plaintiff in error, arrested on the second counts of *each* Indictment.

The errors relied upon for reversal of the judgment, arise upon the judgment roll and a Bill of Exceptions. The questions presented relate to the sufficiency of the Indictment, the nature and character of the offense charged, error in consolidating the Indictments, errors in ruling admissible certain testimony and in overruling objections thereto, error in overruling an objection to certain improper statements made by the Special Attorney for the Government, and tending to prejudice the jury against the defendant, errors in giving certain instructions to the jury, and error in sentencing the defendant to the penitentiary.

ERRORS ASSIGNED.

The following constitute the errors relied upon in support of the prayer for a reversal of the judgment, viz.:

I.

The Indictment is not sustained by Section 3169 of the Revised Statutes; nor does Section 23 of the Act of February 8th, 1875, apply to the case. The court erred in overruling the demurrer.

II.

The court erred in ordering the consolidation of the Indictments.

III.

The court erred in overruling the objection to and in admitting in evidence, the affidavit of defendant made by him in the case of *Isabella M. Williams* vs. *Richard S. Williams*, pending in the Superior Court in and for the City and County of San Francisco, State of California, and filed therein June 1st, 1896. The affidavit is as follows:

"STATE OF CALIFORNIA, } ss.
" *City and County of San Francisco,* }

" Richard S. Williams, being first duly sworn, deposes " and says:

" I have read the affidavit of plaintiff in reply on her " motion for alimony, etc., and in reply thereto I desire " to say it is untrue that prior to the time I entered the em- " ployment of the United States Government I was with- " out means and had had no money for quite a time before, " or that I had to borrow money to pay my living expenses. " On the contrary, when I entered the employment of the " United States Government, on or about the 28th day of " September, 1893, I was worth more money then than I " am at the present time, being worth about $5,000.00, " and since then having inherited some property: that the " $3,000.00 referred to in said affidavit was not acquired " by me during the time I was in the employment of the " United States Government, as set forth in said affidavit, " but is a portion of the $5,000.00 heretofore referred to

"The statement in said affidavit that I have in my "possession or had in my possession, in addition to the "said sum of $3,000.00 aforesaid, the sum of $5,000.00 "instead of $4,000.00 is false and untrue; that to my "knowledge the plaintiff was not in the habit of carrying "said sum of $5,000.00 in the bosom of her dress. (On "the contrary, there was on deposit in the Hibernia Sav- "ings and Loan Society in her name, belonging to me, the "sum of about $4,000.00, which was a part of the $5,000.00 "possessed by me at the time I entered the employment "of the United States Government. The $3,000.00 in "bank referred to is a portion of said sum so deposited in "the name of plaintiff in the Hibernia Savings and Loan "Society.)

"In answer to the statement contained on page 2 of "said affidavit, to the effect that plaintiff paid for the "piano therein referred to and the bill therefor was made "out in her name, I simply desire to annex the bill for "said piano to this affidavit, showing the bill to be made "out in the name of R. S. Williams.

"The property at Nos. 420 and 422 Scott street, men- "tioned on page 2 of said affidavit, was acquired by my "stepfather, Henry Monsferran, now deceased. He was "a foreigner, unaccustomed to speaking the English "language, and the details of the purchase were made by "me, but the money that paid for said property was sole- "ly and exclusively the money of the said Henry Mons- "ferran. The deed to the property was taken in his "name.

"It is untrue that at the time plaintiff left our residence "on the 29th day of April, 1896, she left said sum of "$5,000.00 in greenbacks. On the contrary, as above "stated, there was no such sum, and the money referred "to by her as having been drawn from the Hibernia "Savings and Loan Society is $3,000.00, so deposited in "the savings bank.

"It is untrue, as stated in said affidavit, that I avoid- "ed the service of the summons and complaint in this

" action, or that by reason thereof plaintiff incurred an " expenditure of $11.25.

" RICHARD S. WILLIAMS.

" Subscribed and sworn to before me this 1st day of " June, A. D. 1896.

" [NOTARIAL SEAL.] LEE D. CRAIG,

" *Notary Public in and for the City and County*

" *of San Francisco, State of California.*

" Said affidavit is endorsed: Filed June 1st, 1896. C. " F. Curry, clerk, by Geo. W. Lee, deputy clerk."

IV.

The court erred in overruling the objection to and in admitting in evidence the book of deposit of moneys in the San Francisco Savings Union, a banking corporation of the State of California, which book and deposits are in the name of Richard S. Williams, the defendant, said book showing entries of the following sums deposited on the following dates, viz.: October 29th, 1893, $350; November 18th, 1895, $400; December 17th, 1895, $550, making a total of $1,300.

V.

The court erred in overruling the objection to and in admitting in evidence the book of deposit of moneys in the Hibernia Savings and Loan Society, a banking corporation of the State of California, which book and deposits are in the name of Isabella M. Williams, said book showing entries of the following sums deposited on the following dates, viz.: September 10th, 1895, $300; September 24th, 1895, $150; October 8th, 1895, $800; October 23rd, 1895, $500; November 12th, 1895, $700; December 2nd, 1895, $1,000, making a total of $3,450.

VI.

The court erred in overruling the objection to and in admitting in evidence the testimony of J. J. Tobin relative to the "general reputation" of defendant in the custom house.

VII.

The Court erred in overruling the objection to, and in admitting in evidence, the testimony of Ling Yow, relative to whether he was convicted of perjury, and whether the verdict of the jury was guilty or not guilty, and as to what crime he was charged with in the Indictment, at the time he was tried.

VIII.

The Court erred in overruling the objection to the statement of the Special Attorney for the Government, that "no doubt every Chinese woman who did not pay "Williams was sent back." Said statement was made during the trial, and while the witness John H. Wise was giving his testimony, and tended to prejudice the jury against the defendant.

IX.

The Court erred in giving the following instruction to the jury, viz:

"There has been some testimony in support of the alle-
"gations of these indictments respecting the pecuniary
"condition of the defendant, and also testimony as to the
"extent of his compensation by the Government for ser-
"vices. This evidence was admitted in compliance with
"a well-known rule which establishes the relevance of
"evidence of this character where the charge is such as
"that alleged in these indictments.

"If the salary of the defendant, during the time alleged
"in the indictments and before then, was four or five
"dollars per day, and if the testimony shows to your
"satisfaction that he has deposited in bank or there was
"deposited to his credit in bank in the neighborhood of
"$4,750.00 from September 10th to December 17th, 1895,
"alleged in the indictments, then such testimony may be
"considered by you with a view of ascertaining how or by
"what means the defendant obtained that amount of
"money at a time when his compensation by the Govern-
"ment, as is claimed by the prosecution, was not to exceed
"about $150.00 per month.

" Where did he get such large sums of money ? From " what source other than the source named in the indict- " ments did he acquire this money ? Has he furnished " evidence explaining to your satisfaction the possession " of these sums of money ?

" These are all questions which you will consider, and " if any explanation made by the defendant as to how he " came by this money seems incredible, irrational, and " unsatisfactory you are at liberty to reject it and to act " upon the other testimony in the case. If, after doing " all this, you feel to a moral certainty and beyond a " reasonable doubt that he took the money as alleged in " the indictments, then your verdict should be guilty.

" In reference to the testimony which has been intro- " duced in the case showing the pecuniary condition of " the defendant, that if testimony explaining how, when, " and by what means the defendant acquired possession of " the sums of money shown to have been deposited in the " San Francisco Savings Union and Hibernia Bank could " have been offered by defendant, and he failed to produce " such testimony, then such failure may very properly be " taken into consideration by the jury in determining the " defendant's guilt or innocence.

" Where probable proof is brought of a state of facts " tending to criminate the accused, the absence of evidence " tending to contrary conclusion may be considered, al- " though this attitude of the case alone would not be en- " titled to much weight, because the burden of proof lies on " the prosecution to make out the whole case by sufficient " evidence; but when proof of inculpating circumstances " has been produced tending to support the charge, " and it is apparent that the accused is so situated that " he could offer evidence of all the facts and circumstances " as they existed, and to show, if such was the truth, that " the suspicious circumstances can be accounted for con- " sistently with his innocence, and he fails to offer such " proof, the natural conclusion is that the proof, if pro- " duced, instead of rebutting, would tend to sustain the " charges.

" Therefore, if in this case the defendant could have " produced testimony explaining his several deposits in " the San Francisco Savings Union and the Hibernia Bank " during the months of September, October, November, " and December, 1895, and has failed to produce such " testimony, then you are at liberty to infer that any ex- " planation in his power to make would have been, if " made, adverse and prejudicial to the defense.

" The law has been stated by the circuit court of ap- " peals for the eighth circuit very recently in the case of " Gulf, C. & S. *Co.* Railway *vs.* Ellis, in the 4th United " States circuit court of appeals. Judge Caldwell, speak- " ing for the circuit court of appeals, said:

" 'Now, it is a well-settled rule of evidence that when " the circumstances of proof tend to fix a liability on a " party who has it in his power to offer evidence of all the " facts as they existed and rebut the inferences which the " circumstances in proof tend to establish, and he fails to " offer such proof, the natural conclusion is that the proof, " if produced, instead of rebutting, would support the in- " ference against him, and the jury is justified in acting " upon that conclusion. " It is certainly a maxim," said " Lord Mansfield, " that all evidence is to be weighed " according to the proof which it was in the power of one " side to have produced and in the power of the other side " to have contradicted."

" Blach *vs.* Archer, Cowp., 63, 65.

" 'It is said by Mr. Starkie in his work on Evidence, " vol. 1, p. 54:

" 'The conduct of the party in omitting to produce that " evidence in elucidation of the subject matter in dispute " which is within his power and which rests peculiarly " within his own knowledge frequently affords occasion for " presumption against him, since it raises strong suspicion " that such evidence, if adduced, would operate to his " prejudice.'

" 'The same rule is applicable even in criminal cases. " Com. *vs.* Webster, 5 Cush., 295, 316; People *vs.* Mc " Whorter, 4 Barb., 438.' Respecting the contents of the

" affidavit made by the defendant and sworn to before " Lee D. Craig, a notary public in this city and county, " which has been read in evidence, I instruct you that the " prosecution is not bound by all the statements in said " affidavit. It is the duty of the jury to ascertain from " said affidavit and from the other testimony in the case " what portions of the same are true. The jury is then at " liberty to believe one part of it and to disbelieve the " other part.

" Such affidavit was introduced upon the theory that it " constituted an admission on the part of the defendant " as to his ownership of certain funds referred to therein. " The defense then insisted, as they had a right to, that " the entire affidavit should be read. The whole of it is " now before you, and it is for you to determine, from all of " the circumstances of this case, the situation of the de- " fendant, and all of the evidence that has been introduced, " as to what portion of said affidavit, if any, is true. You " are at liberty to believe or reject such portions of it as " you think may be worthy of belief or disbelief.

" In this respect I call your attention to the deposits " as they were made. The first deposit in the San Fran- " cisco Savings Union was made on October 29, 1895, " amounting to $350. On November 18, 1895, there was " a deposit of $400, and on December 17, 1895, there was " a deposit of $550, making a total of $1,3000.

" Then there was a deposit made with Hibernia Savings " and Loan Society on September 10, 1895, $300; on " September 24th, $150; October 8th, $800; October 23d, " $500: November 12th, $700: December 2d, $1,000, mak- " ing a total of $3,450, and adding the amount deposited " in the San Francisco Savings Union of $1,300, it makes " a total in three months and seventeen days of $4,750.

" These deposits were made, as you will observe, at " different times. In September he appears to have de- " posited the sum of $450; in October he deposited $1,650; " in November he deposited $1,100, and in December, up " to the 17th, he deposited $1,550, making a total, as I " said, of $4,750; nine deposits in three months and seven-

" teen days. Does the defendant's affidavit satisfactorily " explain or account for the receipt of these sums of " money ? "

X.

The Court erred in its judgment sentencing defendant to imprisonment in the California State Prison at San Quentin, for three years, and to pay a fine of $5,000.

ARGUMENT.

1. In the Court below, this case was tried and the defendant convicted and sentenced upon the theory that the Indictment charged him with the offense prescribed by sub-division one of Section 3169 of the Revised Statutes, taken in connection with Section 23 of the Revenue Act of February 8, 1875, Supplement Revised Statutes, page 61; the Court holding defendant to be a customs revenue officer and ascribing the authority for his appointment to a revenue law, to wit: Section 2606 of the Revised Statutes. (Transcript, p. 18 *et seq.*) In this, undoubtedly, the Court below committed a most palpable error. The defendant is not charged in the Indictment with being a revenue or customs revenue officer; on the contrary it is explicitly averred that he is an officer of the Department of Treasury designated "Chinese Inspector at the port of San Francisco," and that the duties of his office and his official functions are to "aid and assist the Col- " lector of Customs of said port in the enforcement and " carrying out of the various laws and regulations of the " said United States relating to the coming of Chinese " persons and persons of Chinese descent from foreign " ports to the United States at said port of San Fran- " cisco."

It is manifest then, that assuming for the purpose of this point, that the averment of official character is sufficient, defendant's official position appertains exclusively to the Chinese Exclusion Law. That law is not a revenue measure; nor is it made such by reason of the fact that its enforcement is committed to the Treasury Department; nor by reason of the fact that in some cases the Collector of Internal Revenue is required to enforce certain of its

provisions, while in other cases, the Collector of Customs is charged with the enforcement of other provisions. It is quite common for Congress to impose such duties on the Department of Treasury and the subordinate officers of that Department (*Nishimura Ekiu* vs. *United States, 142 U. S., 659)*; but it by no means follows that such laws are revenue measures, and the officers revenue officers. Section 3169 of the Revised Statutes applies only to revenue officers, even under the provisions of Section 23 of the Act of February 8th, 1875. That Act is a *revenue* law and the very language of Section 23 confines its operation to persons "acting under the authority of "any internal revenue or customs law or any revenue "provision of any law of the United States, when such "persons are designated or acting as officers or deputies, "or persons having the custody or disposition of any "public money." The Chinese Exclusion Act is in no sense a customs law, and we must confess our complete inability to discover a semblance of reasoning in the mental process, by means of which the lower court held the defendant to be within the provisions of subdivision one of Section 3169 of the Revised Statutes, and punished him accordingly. The court's conclusion is the more indefensible, in view of the fact that in its opinion on the motion in arrest of judgment (Trans. p. 20) reference is made to the very law under which defendant must have been appointed, if at all. That law is to be found in all the Appropriation Acts, from 1890 to the present, and in the following words, under the title of "Miscellaneous objects under the Treasury Department," viz.: "Enforcement of "Chinese Exclusion Act: To prevent unlawful entry of "Chinese into the United States, by the appointment of "suitable officers to enforce the laws in relation thereto "and for expenses of returning to China all Chinese per-"sons found to be unlawfully in the United States."

26 Statutes at Large, 387, 968.
27 Statutes at Large, 589.
28 Statutes at Large, 41, 390, 637, 846, 932.
29 Statutes at Large, 431.

And yet, notwithstanding the averments of the Indictment, the lower court asserts that defendant's appointment was made under the provisions of Section 2606 of the Revised Statutes, which section is one of a series of sections of the *revenue* law of July 14, 1870, relative to "internal taxes," and in its original and unabridged form provides for the appointment at certain ports of the United States of "such number of weighers, gaugers, " measurers and inspectors as may be necessary to exe- " cute the provisions of this Act." The defendant was not appointed under that law, and if he was, his position and duties as Chinese Inspector for the port of San Francisco, and his alleged extortion of money under color of *that* office, would be entirely and absolutely independent of and foreign to his position of inspector under Section 2606 of the Revised Statutes. It is an entirely different office. He is not charged with extortion under color of his office of revenue inspector—the office provided for in Section 2606.

It follows that the Indictment is fatally defective in being framed upon Section 3169, and that the judgment is for the same reason, not merely voidable, but absolutely void.

The law governing the offense of extortion "under color of office" is *Section 5481 of the Revised Statutes*, and the extreme penalty there prescribed is a fine of not more than $500, *or* imprisonment not more than one year; whereas, under Section 3169, the law by virtue of which defendant was sentenced and received the extreme penalty, the punishment is a fine of not less than $1000 nor more than $5000 *and* imprisonment for not less than six months nor more than three years.

2. Even if the Indictment in a case like this could be framed under subdivision one of Section 3169, it would not be valid unless it clearly and unmistakably brought the case within the language of that law.

United States vs. Brewer, 139 U. S., 288.
Hess vs. United States, 124 U. S., 486.
Bishop on Statutory Crimes, Sec. 380.

The Indictment in this case does not do so. It charges extortion " under color of office "; whereas, the extortion provided for in Subdivision one of Section 3169, must be " under color of law."

3. The Indictment is also fatally defective in this: It avers that the money was extorted under color of office, and then states in detail how it was obtained, and that specific statement of the facts shows that the money was not obtained under color of office, but was obtained by false representations ; such being the case it is not extortion.

Collier vs. State, 55 Ala., 125.

4. The Indictment is also fatally defective in this: It does not sufficiently show that defendant was at the time of the alleged extortion an officer of the United States, either *de facto* or *de jure*. The allegation that he was an officer of the Department of Treasury of the United States does not necessarily indicate that he is an officer of the United States ; nor is such an averment sufficiently specific. The allegation that he was " designated as Chinese inspector at the port of San Francisco " does not supply the defect. There is no such officer known to the law as that of Chinese inspector, and even if there was, to allege as does this Indictment that the defendant was a person *designated as Chinese inspector* at said port of San Francisco, is clearly not the equivalent of an allegation that he was Chinese inspector.

II.

The lower court erred in consolidating the Indictments against the defendant's exception. (Trans. 43.) The Indictments state " substantive offences, separate and dis- " tinct, complete in themselves and independent of each " other, committed at different times and not provable by " the same evidence."

McElroy vs. United States, 164 U. S., 76.

The offences could not have been joined in one Indictment, and therefore the Indictments were erroneously consolidated.

Sec. 1024 Revised Statutes.

III.

The court below fell into flagrant error in admitting in evidence against defendant's objection, his affidavit filed in the Superior Court in and for the City and County of San Francisco, in the case of *Williams* vs. *Williams*. (Trans. p. 32.) The purpose for which the court admitted the testimony is stated in the instruction to the jury (Trans. p. 42) to be that it constituted "an admission on "the part of defendant as to his ownership of certain "funds referred to therein." On that basis the court went on and instructed the jury that the *onus* was on the defendant to show that he acquired those funds innocently. That instruction we will attack presently; but even assuming what is not the fact, that the affidavit had such tendency as the court held it to possess, and that it furnished evidence incriminating in character, its admission was in that case in plain violation of Section 860 of the Revised Statutes. It constituted evidence obtained from a party by means of a judicial proceeding and for that reason was not admissible.

IV.

There is likewise manifest error in admitting the bank books in evidence (Trans. p. 34); especially the bank book of Isabella M. Williams,—a person not shown to be in privity with defendant. These bank books, together with the affidavit, constitute the evidence on which the lower court gave to the jury a certain exceedingly erroneous instruction; in the discussion of that error we can better demonstrate the injury we sustained by the admission in evidence of the affidavit and bank books, and therefore refer to what is hereinafter said upon the subject.

V.

The testimony of J. J. Tobin (Trans. p. 35 *et seq*), introduced and by the court admitted to impeach the credibility of defendant, is another instance of flagrant error. A witness cannot be impeached by evidence of his reputation for truth, honesty and integrity, *in the custom house*, and the defendant's objection should have been sustained.

People vs. Markham, 64 Cal., 163.

VI.

Ling Yow was one of the witnesses for the defendant, and after giving material testimony in support of defendant's case (Trans. p. 36), he was asked as to whether he was ever convicted of perjury, what offense he was charged with in the Indictment, and whether the verdict was guilty or not guilty. Objection was made to each of those questions as being irrelevant, incompetent, and that the proper foundation had not been laid and that the record was the best evidence. The objections were overruled and exceptions reserved. The rulings were clearly erroneous.

People vs. Reinhart, 39 Cal., 449.
1 Greenleaf on Evidence, Sec. 457.
People vs. Hamblin, 68 Cal., 103.
People vs. Crapo, 76 N. Y., 293.

VII.

The action of the lower court in overruling the objection made to the statement of Mr. Henley, special counsel for the prosecution, (Trans. p. 35) is gross error. When he stated in the hearing of the jury that "no doubt every "Chinese woman who did not pay Williams was sent "back" to China, it was the duty of the court to rebuke counsel for making such an improper remark; but instead of a rebuke, the court gave emphasis to and corroborative of the statement by overruling defendant's objection to it. Such action on the part of the court constitutes reversible error.

Graves vs. United States, 150 U. S., 120.

VIII.

The court in instructing the jury (Trans. p. 41), adverted to the affidavit of defendant in the case of *Williams* vs. *Williams*, and to the various deposits shown by the bank books and aggregating $4,750, and told the jury that they might consider those deposits in connection with the other fact that the defendant received from the Government a salary not to exceed about $150 per month, and that they were to ascertain how or by what means the defendant obtained the $4,750. "Where did he get such large sums of money? "from what source other than the source named in the

" Indictments did he acquire this money ? Has he fur-
" nished evidence explaining to your satisfaction the
" possession of these sums of money ?" * * * *
" Therefore if in this case the defendant could have pro-
" duced testimony explaining his several deposits in the
" San Francisco Savings Union and the Hibernia Bank
" during the months of September, October, November,
" and December, 1895, and has failed to produce such
" testimony, then you are at liberty to infer that any ex-
" planation in his power to make would have been if
" made, adverse and prejudicial to the defense." These are portions of the instructions given; there is more of a like character. That the District Judge did not understand the law, is apparent. In the first place he was wrong in referring to the deposit in the Hibernia Bank as the *defendant's* deposit; there is no evidence to that effect in the case, and the transcript of the record at page 35, virtually so declares. In the next place the combined Indictments charged an extortion of but $185, and yet the instruction called upon the defendant to explain deposits made before and after the alleged commission of the offenses, and aggregating $4,750. In the next place, as the transcript affirmatively shows at page 43, there was no evidence that any part of said sum of $4,750 constituted the "fruit of crime" (*3 Greenleaf on Evidence, Sec. 31*), nor that any portion of that sum embraced the $185, "the money " charged in the Indictments herein to have been unlaw-
" fully taken by defendant." In short, there was nothing *suspicious* in character in the fact that the deposits had been made; and it is only where there exists suspicious and inculpatory circumstances relative to the acquisition of the money that the rule referred to by the lower court has any application. The presumption of innocence protected the defendant from every adverse inference that the lower court told the jury they could draw from the unexplained possession by defendant of the money on deposit in his name. It was not shown to be the fruit of crime; it was not shown to be suspicious or inculpatory, and therefore no explanation from defendant was neces-

sary. It is to be noted that the record affirmatively shows that the bank books and the affidavit are the only evidence before the court relative to said deposits. (Trans. p. 35.) The true rule is stated in *Graves* vs. *United States, 150 U. S., 120,* and it is quite clear that the District Judge did not correctly understand the rule nor the authorities he cited. His instruction violates the law as declared in

Chaffee vs. United States, 18 Wall., 516, 545.
Doty vs. State, 7 Blackf., 427.

IX.

The judgment is undoubtedly void. It is based upon Section 3,169 of the Revised Statutes, and we have pointed out that the case is not within the provisions of that section. The penalty for extortion under "color of office" is prescribed by Section 5,481, and is limited to one year or a fine of $500. The judgment is also void because by its terms the defendant is sentenced for extorting $85 "under color of his office as Chinese inspector of the Department of Treasury at the port of San Francisco." (Trans. 17). There is no such office known to the law. The judgment is likewise void for the reason that the Indictment is insufficient to sustain it—a point hereinbefore fully discussed.

We respectfully submit that the judgment ought to be *reversed.*

GEORGE D. COLLINS,
Counsel for Plaintiff in Error.